

A **DATUK S NALLAKARUPPAN & ORS v. DATUK SERI ANWAR
IBRAHIM & OTHER APPEALS**

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
DAVID WONG DAK WAH JCA

B ABANG ISKANDAR JCA
[CIVIL APPEALS NO: W-02(IM)(NCVC)-153-01-2013,
W-02(IM)(NCVC)-249-01-2013 & W-02(IM)(NCVC)-261-01-2013]
29 MAY 2015

C **TORT:** Defamation – Defence – Justification, qualified privilege and fair comment
– Reliance on facts in criminal case to support defences – Whether plea in impugned
paragraphs of defendants’ statements of defences contravened s. 43 Evidence Act 1950
– Whether judgment in criminal case could be used as proof of fact in civil case –
Whether s. 43 barred defendant from relying on judgment of another court
D proceeding

TORT: Defamation – Defence – Justification, qualified privilege and fair comment
– Applicability of s. 43 Evidence Act 1950 – Test of – Whether judgment in another
proceeding relevant to present civil proceeding

E **TORT:** Defamation – Proceedings – Defence – Justification, qualified privilege and
fair comment – Reliance on facts in criminal case to support defences – Whether
conviction for criminal offence relevant as evidence of bad character – Whether only
evidence of general reputation and disposition admissible to prove character of person
– Evidence Act 1950, ss. 52 & 55

F **CIVIL PROCEDURE:** Proceedings – Defamation suit – Defence – Reliance on
facts in criminal case to support defences – Whether judgment in criminal case could
be used as proof of fact in civil case – Whether judgment in another proceeding
relevant to present civil proceeding – Evidence Act 1950, s. 43 – Applicability of –
Whether conviction for criminal offence relevant as evidence of bad character –
G Whether only evidence of general reputation and disposition admissible to prove
character of person – Evidence Act 1950, ss. 52 & 55

The respondent/plaintiff had filed a defamation suit against all three
appellants/defendants arising from the publication of an article in a Malay
daily Utusan Melayu, entitled ‘Anwar Bisexual, tak boleh jadi Ketua
H Pembangkang – Nalla’ (‘the impugned article’). All the three defendants have
raised justification, qualified privilege and fair comment as part of their
defence. The defendants relied on the following facts in criminal cases to
support their defences (i) the plaintiff’s previous conviction for four charges
of corrupt practices under s. 2(1) of the Emergency (Essential Powers)
Ordinance No. 22 of 1970 on 24 April 1998; and (ii) the remark in the
I majority judgment of the Federal Court in *Dato Seri Anwar Ibrahim v. PP &
Anor* to the effect that there was evidence to show the plaintiff was involved
in homosexual activities, though the plaintiff was successful in his appeal

before the Federal Court against his conviction for a charge of sodomy under s. 377B of the Penal Code. The plaintiff argued that the plea contained in the impugned paragraphs of the defendants' defences should not be allowed as it contravened s. 43 of the Evidence Act 1950 ('the Act') and ought to be struck out. The High Court held that s. 43 of the Act prohibited a defendant in a libel action to found justification by reliance on the judgments, orders or decrees from some other legal proceedings. Three appeals were brought before this court (i) the first defendant's appeal against the High Court decision allowing in part the plaintiff's application to strike out certain paragraphs in the first defendant's defence (Appeal 153); (ii) the second and third defendants' appeal against the same High Court decision allowing plaintiff's application to strike out certain paragraphs of the second and third defendants' defence in respect of defence of justification (Appeal 249); and (iii) the plaintiff's appeal against the same High Court decision in dismissing the plaintiff's application to strike out the first, second and third defendants' defence relating to qualified privilege (Appeal 261). The issues that arose were (a) the applicability of s. 43 of the Act; (ii) whether the defendants were prevented by s. 43 Act from relying on the facts pleaded in the impugned paragraphs of the relevant statement of defences in respect of which the plaintiff had applied to strike out.

Held (dismissing defendants' appeals; allowing plaintiff's appeal)

Per Abdul Aziz Abdul Rahim JCA delivering the judgment of the court:

- (1) There is no ambiguity in s. 43 of the Act that as a matter of evidence, judgment, order or decree is irrelevant except where the existence of such judgment, order or decree is a fact in issue or that such judgment, order or decree is relevant under some other provisions of the Act. A judgment in a criminal case could not be used as proof of a fact in issue in a civil case for claim for damages. Therefore, with regard to the defendants' defence of justification, s. 43 of the Act would be a bar to the defendants to rely on the judgment or order or decree of another court proceeding more so it was a criminal proceeding. (paras 11, 23 & 24)
- (2) The Judicial Commissioner had adopted different tests when applying s. 43 – one test for plea of justification and another for plea of qualified privilege and fair comments. This was not a proper way to interpret and apply a statutory provision. There should be only one test; and that is whether the judgment relied on is relevant. Once it is decided that under s. 43 that the judgment in another proceeding is not relevant to the civil proceeding at hand, then it is not relevant for all purposes unless it can be brought within the 'exception'. (para 27)
- (3) In civil proceedings, ss. 52 and 55 of the Act are the relevant provisions. Under these two provisions, conviction for criminal offence is not relevant as evidence of bad character. Furthermore, the explanation to s. 55 makes it very clear that only evidence of general reputation and

- A general disposition was admissible to prove bad or good character. It could not be proved by a particular act. The defendant, by relying on the conviction of the plaintiff in the second sodomy case and the remark by the Federal Court as to the plaintiff's act of homosexual activities in the first sodomy case, was in fact relying on particular acts to show
- B general reputation and general disposition of the plaintiff. This was not correct and was not permissible by virtue of s. 55. (para 30)

Bahasa Malaysia Translation Of Headnotes

- C Responden/plaintif telah memfailkan guaman fitnah terhadap ketiga-tiga perayu/defendan yang berbangkit daripada penerbitan sebuah artikel dalam surat khabar Bahasa Malaysia iaitu Utusan Melayu yang bertajuk 'Anwar Bisexual, tak boleh jadi Ketua Pembangkang - Nalla' ('artikel yang dipersoalkan'). Ketiga-tiga defendan telah membangkitkan justifikasi, kepentingan bersyarat dan ulasan saksama sebagai sebahagian daripada pembelaan mereka. Defendan-defendan bergantung kepada fakta-fakta
- D berikut dalam beberapa kes jenayah untuk menyokong pembelaan mereka (i) sabitan terdahulu plaintiff untuk empat tuduhan rasuah di bawah s. 2(1) Ordinan Darurat (Kuasa-Kuasa Perlu) No. 22 1970 pada 24 April 1998; dan (ii) ulasan dalam penghakiman majoriti Mahkamah Persekutuan *Dato Seri Anwar Ibrahim v. PP & Anor* yang membawa kesan bahawa terdapat
- E keterangan yang menunjukkan plaintiff terlibat dalam kegiatan homoseksual, walaupun plaintiff berjaya dalam rayuannya di Mahkamah Persekutuan terhadap sabitan yang dikenakan ke atasnya berhubungan pertuduhan liwat di bawah s. 377B Kanun Keseksaan. Plaintiff menghujahkan bahawa pli yang terdapat dalam perenggan-perenggan yang dipersoalkan dalam pembelaan
- F defendan-defendan tidak sepatutnya dibenarkan kerana ia melanggar s. 43 Akta Keterangan 1950 ('Akta') dan harus dibatalkan. Mahkamah Tinggi memutuskan bahawa s. 43 Akta melarang defendan dalam tindakan *libel* untuk memperolehi justifikasi dengan bergantung kepada penghakiman, perintah, dekri dari beberapa prosiding undang-undang yang lain. Tiga rayuan dibawa ke mahkamah ini (i) rayuan defendan pertama terhadap
- G keputusan Mahkamah Tinggi membenarkan sebahagian daripada permohonan plaintiff untuk membatalkan beberapa perenggan dalam pembelaan defendan pertama (Rayuan 153); (ii) rayuan defendan kedua dan ketiga terhadap keputusan Mahkamah Tinggi membenarkan permohonan plaintiff untuk membatalkan beberapa perenggan dalam pembelaan defendan
- H kedua dan ketiga berkenaan pembelaan justifikasi (Rayuan 249) dan (iii) rayuan plaintiff terhadap keputusan Mahkamah Tinggi menolak permohonan plaintiff untuk membatalkan pembelaan kepentingan bersyarat defendan-defendan (Rayuan 261). Isu-isu yang berbangkit adalah (a) kebolegunaan s. 43; (ii) sama ada defendan-defendan dilarang oleh s. 43 Akta daripada bergantung kepada fakta-fakta yang dirayu dalam perenggan-perenggan yang dipersoalkan dalam kenyataan pembelaan yang relevan yang telah dipohon plaintiff untuk membatalkannya.
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Diputuskan (menolak rayuan defendan-defendan; membenarkan rayuan plaintiff)

Oleh Abdul Aziz Abdul Rahim HMR menyampaikan penghakiman mahkamah:

- (1) Tiada ketaksan dalam s. 43 Akta bahawa sebagai perkara keterangan, penghakiman, perintah atau dekri tidak relevan kecuali di mana keterangan penghakiman, perintah atau dekri itu adalah fakta dalam isu atau penghakiman, perintah atau dekri itu adalah relevan di bawah peruntukan lain dalam Akta. Penghakiman dalam kes jenayah tidak boleh digunakan sebagai bukti fakta dalam isu dalam kes sivil untuk tuntutan ganti rugi. Oleh itu, berkenaan pembelaan justifikasi defendan-defendan, s. 43 Akta menghalang defendan-defendan daripada bergantung kepada penghakiman atau perintah atau dekri prosiding mahkamah yang lain, lebih-lebih lagi ia adalah prosiding jenayah.
- (2) Pesuruhjaya Kehakiman telah mengamalkan dua ujian berbeza apabila menggunakan s. 43 - satu ujian untuk pli justifikasi dan satu lagi untuk pli kepentingan bersyarat dan ulasan saksama. Ini bukan cara yang betul untuk mentafsirkan dan menggunakan satu peruntukan statutori. Perlu ada hanya satu ujian; iaitu sama ada penghakiman yang dirujuk itu adalah relevan. Sebaik sahaja ia diputuskan di bawah s. 43 bahawa penghakiman dalam prosiding lain adalah tidak relevan kepada prosiding sivil ini, maka ia tidak relevan bagi segala tujuan, melainkan ia boleh terangkum dalam pengecualian.
- (3) Dalam prosiding sivil, ss. 52 dan 55 Akta adalah peruntukan yang relevan. Di bawah kedua-dua peruntukan ini, sabitan kesalahan jenayah adalah tidak relevan sebagai keterangan membuktikan watak yang jahat. Selanjutnya, penjelasan s. 55 menunjukkan dengan jelas bahawa keterangan reputasi dan kecenderungan am boleh diterima masuk untuk membuktikan watak yang baik atau jahat. Ia tidak boleh dibuktikan oleh sesuatu perbuatan tertentu. Defendan, dengan bergantung kepada sabitan plaintiff dalam kes sodomi kedua dan ulasan oleh Mahkamah Persekutuan berkenaan kegiatan homoseksual plaintiff dalam kes sodomi pertama, adalah secara fakta bergantung kepada perbuatan-perbuatan tertentu untuk menunjukkan reputasi dan kecenderungan am plaintiff. Ini tidak betul dan tidak boleh dibenarkan menurut s. 55.

Case(s) referred to:

Anwar Ibrahim v. Khalid Jefri & Anor (Civil Appeal No: W-02741-2000 (Unreported) (refd)

Barclays Bank Ltd v. Cole [1966] 3 All ER 948 (refd)

Choo Michael v. Loh Shak Mow [1994] 1 SLR 584 (not foll)

Dato' Seri Anwar Ibrahim v. Dato' Seri Dr Mahathir Mohamad [2001] 1 CLJ 663 FC (refd)

Dato' Seri Anwar Ibrahim v. PP & Anor [2004] 3 CLJ 737 FC (refd)

DP Vijandran v. Karpal Singh & Ors [2000] 6 CLJ 433 HC (refd)

Goody v. Odhams Press, Ltd [1966] 3 All ER 369 (refd)

- A** *Gopalkrishna Gupthan v. Annmalu Ammal* AIR [1972] KER 196 (*refd*)
Hollington v. F Hewthorn & Co Ltd [1943] 2 All ER 35 (*refd*)
Hunter v. Chief Constable of West Midlands Police [1981] 3 All ER 727 (*refd*)
Jorgensen v. News Media (Auckland) Ltd [1969] NZLR 961 (*refd*)
Ong Tua Chor v. Lee Beng Tong [1975] 1 LNS 116 HC (*refd*)
She Eng Gek v. DA De Silva [1956] 1 LNS 113 HC (*refd*)
- B** *YK Fung Securities Sdn Bhd v. James Capel (Far East) Ltd* [1997] 4 CLJ 300 CA (*refd*)
- Legislation referred to:**
Emergency (Essential Powers) Ordinance No. 22 of 1970, s. 2(1)
Evidence Act 1950, ss. 40, 41, 42, 43, 52, 53, 54, 55
Penal Code, s. 377B
- C** Rules of the High Court 1980, O. 18 r. 19
Evidence Act [Sing], s. 45A
Evidence Act [India], s. 43
(Civil Appeal No: W-02(IM)(NCVC)-153-01-2013)
For the appellant - Muhammad Shafee Abdullah (Sarah Maalini Abishegam with him);
D M/s Shafee & Co
For the respondent - Shahid Adli Kamarudin (Michelle Yesudas with him); M/s Daim & Gamany
(Civil Appeal No: W-02(IM)(NCVC)-249-01-2013)
For the appellant - Firoz Hussein Ahmad Jamaluddin (Muhammad Asmirul Asraf Fadli with him); M/s Hafarizam Wan & Aisha Mubarak
E For the respondent - Shahid Adli Kamarudin (Michelle Yesudas with him); M/s Daim & Gamany
(Civil Appeal No: W-02(IM)(NCVC)-261-01-2013)
For the appellant - Shahid Adli Kamarudin (Michelle Yesudas with him); M/s Daim & Gamany
F For the respondent - Firoz Hussein Ahmad Jamaluddin (Muhammad Asmirul Asraf Fadli with him); M/s Hafarizam Wan & Aisha Mubarak
[Editor's note: For the High Court judgment, please see Dato' Seri Anwar Ibrahim v. Datuk S Nallakaruppan & Ors [2013] 1 LNS 991 (overruled in part).]
G Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Aziz Abdul Rahim JCA:

H The Appeals

[1] There are three appeals before us:

- I** (i) Appeal No: W-02(IM)(NCVC)-153-01-2013 - first defendant/appellant appealed against the High Court decision on 26 December 2012 allowing in part the plaintiff/respondent's application to strike out certain paragraphs in the first defendant's defence - paras 1, 1.1 to 1.3, 9(f), (g), (h), 10.1 to 10.7 and para 18.

- (ii) Appeal No: W-02(IM)(NCVC)-249-01-2013 - second defendant and third defendant/first appellant and second appellant respectively appealed against the same High Court decision allowing plaintiff/respondent's application to strike out para 1.1 till 1.8 of the second defendant and third defendant defence in respect of defence of justification. A
- (iii) Appeal No: W-02(IM)(NCVC)-261-01/2013 - plaintiff/respondent appealed against the same High Court decision dismissing the plaintiff's application to strike out the respondent/first defendant, second defendant, third defendant defence in para. 1.1 till 1.8 of the second defendant and third defendant defence relating to qualified privilege. B
- C

All the three appeals arose from the High Court decision given on 26 December 2012 in Kuala Lumpur Guaman Sivil No: 23 NCVC-42-03/2012.

Material Facts

[2] The plaintiff had filed the defamation suit against all three defendants arising from the publication of an article in a Malay daily Utusan Melayu, entitled "Anwar Bisexual, tak boleh jadi Ketua Pembangkang - Nalla" (the impugned article). The words in the impugned article are attributed to the first defendant. The second defendant is the publisher of the Malay daily who published the impugned article. The third defendant is the Editor of the Malay daily Utusan Melayu. D

[3] The second and third defendants had filed a joint defence. First defendant filed his own separate defence. All the three defendants however have raised justification, qualified privilege and fair comment as part of their defence. E

[4] In the relevant paragraphs of the statement of defence, all three defendants relied on the following facts in criminal cases including the plaintiff to support their defences: F

- (i) Plaintiff's previous conviction for four charges of corrupt practices under s. 2(1) Emergency (Essential Powers) Ordinance No. 22 of 1970 on 24 April 1998. G
- (ii) The remark in the majority judgment of the Federal Court in *Dato' Seri Anwar Ibrahim (plaintiff in this case) v. PP & Anor* [2004] 3 CLJ 737; [2004] 3 MLJ 405 to the effect that there was evidence to show plaintiff was involved in homosexual activities, though the plaintiff was successful in his appeal before the Federal Court against his conviction for a charge of sodomy under s. 377B of Penal Code. H

Plaintiff's/Respondent's Submission

[5] Learned counsel for the plaintiff argued that the plea contained in the impugned paragraphs of the defendants' defences should not be allowed as it contravened s. 43 of the Evidence Act and ought to be struck out. I

A Findings By The High Court

[6] The learned Judicial Commissioner of the High Court Justice Vazeer Alam Mydin Meera, after considering submission by counsel and the authorities cited to him concluded at para. 27 of his judgment as follows:

B [27] Though I find the arguments of counsel for the Defendants highly persuasive, and the rationale for reform advanced by the English Court of Appeal in the *Barclay's Bank Ltd* case to be compelling, until there is statutory amendment to section 43 of the Evidence Act, I would have to follow judicial precedent and accept the proposition that a previous conviction cannot be adduced in evidence to prove truth of that conviction. Though the common law position embodied in Hollington's case has been rejected by many common law jurisdictions including the land of its birth, the statutory embodiment of that rule in section 43 of the Evidence Act stands undisturbed in this country and this court has to give effect to that law as it stands. The position in the United Kingdom and Singapore has been changed following statutory intervention.

D The learned Judicial Commissioner also relied on *Anwar Ibrahim v. Khalid Jefri & Anor* (Civil Appeal No: W-02741-2000 (Unreported) where the Court of Appeal struck out a plea of the plaintiff's criminal conviction to found justification a defence in a libel case by virtue of s. 43 of Evidence Act 1950 and said that "... in as much as I may think that this area of the law may be ripe for reform, the doctrine of *stare decisis* would require me to follow that judicial precedent".

F [7] The next case considered by the learned Judicial Commissioner is the Federal Court case of *Dato' Seri Anwar Ibrahim v. Dato' Seri Dr Mahathir Mohamad* [2001] 1 CLJ 663 - referred to by counsel for the defendants. The respondent in that case had relied on the conviction of two persons, one Dr Munawar Ahmad Anees (Munawar) and Sukma Dermawan Saasmitaat Madja (Sukma) on charges that they had allowed the applicant there (the plaintiff here) to sodomise them to support his defence of justification. The respondent/defendant in that case was successful before the High Court and Court of Appeal to have the suit against him struck off. The appellant then applied for leave to appeal to Federal Court on the question *inter alia* whether in a defamation action, the High Court can decide on the defence of justification and qualified privilege without a trial to dismiss the plaintiff suit under O. 18 r. 19 Rules of the High Court 1980. The Federal Court answered the question in affirmative and said that the trial judge in that case had correctly addressed the issues of justification and qualified privilege on the facts admitted and the confession as to the acts of gross indecency in the criminal cases involving Munawar and Sukma. Counsel for the defendants in the present appeals submitted that the Federal Court case is the authority for the proposition that the findings in a criminal trial can be used as defence of justification in a civil action. The learned Judicial Commissioner however rejected this argument on the ground that the Federal Court in that case did

not consider the effect of s. 43 of Evidence Act and moreover it was just an observation by the Federal Court made in the course of considering an application for leave to appeal. In the result, the learned Judicial Commissioner concluded at para. 31 of his judgment as follows:

[31] I find that for reasons stated above, section 43 of the Evidence Act would prohibit a defendant in a libel action to found justification by reliance on the judgments, orders, or decrees from some other legal proceedings.

Defendants' /Appellants' Submission

[8] In these three appeals before us, counsel for the appellants in Appeal No. 153 and 249 had urged this court to be inspired and to interpret s. 43 broadly and to move with the time by taking the development in UK, Hong Kong, New Zealand and Singapore in this area of law into consideration. It was submitted that the law in s. 43 of Evidence Act is an embodiment of a common law rule laid down in the English case of *Hollington v. F Hewthorn & Co Ltd* [1943] 2 All ER 35. This decision had been cited with approval by our courts. See *She Eng Gek v. DA De Silva* [1956] 1 LNS 113; [1957] 23 MLJ 55, *Ong Tua Chor v. Lee Beng Tong* [1975] 1 LNS 116; [1976] 1 MLJ 187 and *YK Fung Securities Sdn Bhd v. James Capel (Far East) Ltd* [1997] 4 CLJ 300; [1997] 2 MLJ 61, CA and *DP Vijandran v. Karpal Singh & Ors* [2000] 6 CLJ 433; [2000] 3 MLJ 22. However, it was submitted that *Hollington's* case (*supra*) is no longer good law. The alternative argument by the defendants (with regard to s. 43 Evidence Act 1950) is not to strike out the impugned paragraphs of the defences based on s. 43 of the Evidence Act but to allow the evidence to run and the applicability of s. 43 Evidence Act is to be decided by the trial judge at or during the trial. This alternative argument was advanced by Tan Sri Mohamad Shafee of counsel for the first defendant/appellant in Appeal No. 153.

The issue

[9] Thus, the core issue in these appeals is the applicability of s. 43 Evidence Act and whether the defendants are prevented by s. 43 Evidence Act from relying on the facts pleaded in the impugned paragraphs of the relevant statement of defences in respect of which the plaintiff had applied to strike out.

Our opinion

[10] Section 43 of Evidence Act 1950 provides that:

Judgments, orders or decrees other than those mentioned in ss. 40, 41 and 42 are irrelevant unless the existence of such judgment order or decree is a fact in issue or is relevant under some other provisions of this Act.

A [11] Having read and re-read s. 43 above, we are of the view that there is no ambiguity in the section that as a matter of evidence, judgment, order or decree is irrelevant except where the existence of such judgment, order or decree is a fact in issue or that such judgment, order or decree is relevant under some other provisions of the Act. With respect to the last limb of
B s. 43 which reads "... or is relevant under some other provisions of this Act", we will come back to address this later. For the time being, suffice for us to say that the only exception, if we may use that expression, that makes judgment, order or decree relevant under s. 43 as a matter of evidence is where the judgment, order or decree is relevant for the purpose of ss. 40, 41
C and 42 of the Evidence Act 1950. However, neither of those three sections are in issue in these appeals and therefore not applicable; nor the judgment in question is a fact in issue.

 [12] We have stated earlier that s. 43 of the Evidence Act is embodiment of the common law laid down by the *Hollington's* case (*supra*). Learned
D counsel for all the defendants submitted that, we should depart from the rule in *Hollington's* case (*supra*) in so far as it is relevant to the interpretation or application of s. 43 of the Evidence Act. In arguing this proposition it was submitted that the *Hollington's* case (*supra*) had been criticised heavily by later cases "for its total lack of logic and sense" and therefore no longer good
E law. To support this argument, reference was made to the views expressed by Lord Denning MR in *Goody v. Odhams Press, Ltd* [1966] 3 All ER 369. And also in the case of *Barclays Bank Ltd v. Cole* [1966] 3 All ER 948. In these two cases, Lord Denning MR had expressed the view that the legal position of the *Hollington's* case (*supra*) rule on the relevancy of a criminal judgment or
F decision in a civil proceeding or action should be reviewed. In fact very much later the law in England on this point was changed by way of legislative intervention as recommended by the Law Reform Committee.

 [13] Learned counsel for the defendants also pointed out to us that the highest court in New Zealand had also criticised *Hollington's* case (*supra*) as
G early as 1969 in the case of *Jorgensen v. News Media (Auckland) Ltd* [1969] NZLR 961 and had refused to follow it. It was further submitted that closer to home, Singapore has an identical provision to our s. 43 Evidence Act and that Singapore has overcome the problem posed by their s. 45 Evidence Act by a legislative amendment with the introduction of s. 45A. Learned counsel for the defendants cited the Singapore case of *Choo Michael v. Loh Shak Mow*
H [1994] 1 SLR 584, where the learned High Court judge had expressed the opinion that *Hollington's* case (*supra*) would definitely have been overruled by the House of Lords.

I [14] However, we make two observations. First, though Lord Denning MR in the two English cases cited by the defendants counsel had been critical of the *Hollington's* case (*supra*) decision on the issue, the Master of the Rolls did not go so far as to say that it was no longer good law then. In fact in *Barclays* (*supra*) the Master of the Rolls said in respect of the rule in *Hollington's* case

(*supra*): "... it is made possible by the unfortunate decision of the court in *Hollington v. F Hewthorn Co Ltd* where it was held that a conviction in a criminal court cannot be used as evidence, not even *prima facie* evidence in a civil case. I hope that it soon will be altered."

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[15] It is observed that in *Barclays (supra)* the other two Lord Justices ie, Dankwert LJ and Salmon LJ although agreeing with Lord Denning MR's criticisms of *Hollington's case (supra)* also did not make any pronouncement to the effect of over ruling or refusing to follow-line *Hollington's case (supra)* rules. It appears that the rule in *Hollington's case (supra)* would have been applicable but for the legislative intervention that amended the law.

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[16] Secondly, in respect of the Singapore decision in *Choo Michael's case (supra)*, the learned High Court Judge had referred to the judgment of Lord Diplock in *Hunter v. Chief Constable of West Midlands Police* [1981] 3 All ER 727 and expressed the view that the *Hollington's case (supra)* "would have been expressly overruled by the House of Lords if it had not been abolished earlier by statute", and decided not to follow *Hollington's case (supra)*. We note that the decision in *Choo Michael's case (supra)* was in 1993. At that material time s. 45 of the Singapore Evidence Act (Chapter 97) which is in *pari materia* with our s. 43 of the Evidence Act 1950 was, and still in force. The learned judge had not considered the effect of s. 45 of the Singapore Evidence Act which is the statutory provision applicable then regarding the issue of relevancy and admissibility of previous criminal conviction or judgment in relation to a civil action. Instead, the learned judge had concentrated mainly on the common law position by looking at the English cases and cases from other common law jurisdictions such as United States and New Zealand. We also note that the effect of s. 45 of the Singapore Evidence Act on the relevancy and admissibility of previous criminal conviction or judgment by or before a Singapore Court as evidence for the purpose of proving in any proceeding the fact that a person had committed the offence which is in issue was altered only in 2014 with the introduction of a new s. 45A in the Singapore Evidence Act. In our view the Singapore decision in *Choo Michael's case (supra)* is not an accurate precedent to follow. This is because we have s. 43 which is a statutory provision that expressly provides for the relevancy or otherwise of previous criminal conviction or judgment in a subsequent civil action.

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[17] In this regard, we agree with the statement by the learned Judicial Commissioner in this case at para. 27 of his written grounds of judgment as quoted earlier. The courts do not make laws. That is the prerogative of the Legislature. The courts only interpret and apply the laws made and passed by the Legislature.

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[18] Learned counsel for the first defendant in Appeal No: 153 further submitted that though the remarks by the learned Justice Hamid Mohamed FCJ in the 2004 sodomy case which involved the plaintiff, could be said to be

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- A only an opinion, it is nevertheless an opinion based on evidence and that it had formed part of the court judgment. Therefore the defendants may rely on it to support the defence of justification, fair comment and qualified privilege. It was argued that the word ‘judgment’ in s. 43 ought to include opinions. We are perplexed by this argument. We think learned counsel is trying to split hairs.
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- [19] No doubt judgment of court consists of opinion of the court as to the facts and evidence adduced before it. However, s. 43 is very clear that judgment, order and decree is irrelevant unless they can be brought within the “exception” under the section. In this respect, learned counsel for the plaintiff submitted if s. 43 prohibits a judgment to be brought in as evidence, *fortiori* reasons or opinions which are *obiter* in the judgment cannot also be brought in as evidence. We agree with this submission.
- C

- [20] Learned counsel for the first defendant in Appeal No: 153 argued that the remark by the Federal Court in the 2004 case is not an *obiter* but it is an opinion based on evidence. However, we must emphasise that the remark was based on inadmissible evidence. So technically and judicially speaking therefore, there is no evidence to support that remark. In the circumstances, it remains a personal opinion of the learned judge who had expressed it. Thus, such remarks as evidence of facts in another case would have little or no probative value.
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- [21] Our s. 43 is in *pari materia* with s. 43 of the Indian Evidence Act. Based on the Indian authorities cited to him, learned Judicial Commissioner concluded that the rationale for the enactment s. 43 is that every case is to be treated as a class by itself; and the production of a previous judgment merely establishes the existence of a prior decision. There is no presumption that a prior judgment is the correct decision on the matter. What the law of *res judicata* establishes is that one cannot go behind the decision in certain similar factual cases based on the ground of public policy. The fact in issue in each case must be proved independently.
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- [22] The rational underlying s. 43 can be gleaned from the statement in *Hollington’s case (supra)* which is as follows: “The court which has to try the claim for damages knew nothing of the evidence that was before the criminal court. It cannot know what arguments were addressed to the court or what influence the court in arriving at its decision. Moreover, the issue in the criminal proceeding is not identical with that raised in claim for damages.”. In other words, as said in the Indian case of *Gopalkrishna Gupthan v. Annmalu Ammal* AIR [1972] KER 196:
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- ... it is the duty of the court to scrutinise the soundness or validity of opinion evidence exercising its own independent judgment. In the case of a previous judgment such scrutiny is impossible because the court trying the subsequent case cannot reopen the case and hear it on the merits as
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if the court is hearing an appeal or is retrying the previous case on fresh evidence. The court in the subsequent case has to decide it on the materials before it exercising its own independent judgment ...

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[23] In the face of overwhelming authorities locally and from foreign jurisdictions in particular UK (before the statutory intervention) and India that had been considered by the learned Judicial Commissioner that a judgment in a criminal case cannot be used as proof of a fact in issue in a civil case for claim for damages, we are inclined, as the learned Judicial Commissioner did, to agree with the above statement.

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[24] Therefore, with regard to the defendants' defence of justification, we are in agreement with the learned Judicial Commissioner that s. 43 of the Evidence Act would be a bar to the defendants to rely on the judgment or order or decree of another court proceeding more so it is a criminal proceeding.

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[25] Now, we address specifically Appeal No: 261 where the plaintiff appealed against the decision of the learned Judicial Commissioner dismissing the plaintiff's application to strike out the same paragraph in the defendants' defence in relation to the defence of qualified privileges and fair comment. The rationale for the learned Judicial Commissioner for so deciding is that the defence of qualified privilege attached to the occasion or circumstances of the publication of the defamatory statement rather than the statement itself. It is immaterial if the statement may later turn out to be untrue provided the defendant had acted responsibly and not totally indifferent or reckless as the truth of the statement. It was rationalised that the defence of qualified privilege was predicated on the issue of public interest and responsible journalism and that the media has a duty to disseminate information of public importance.

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[26] With regard to the defence of fair comment, the learned Judicial Commissioner said that the defendant had the right to this defence of fair comment for the impugned statement are comments and expression of opinion of the judgment commented upon.

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[27] It appears to us that the learned Judicial Commissioner is adopting different test when applying s. 43 - one test for plea of justification and another for plea of qualified privilege and fair comments. In our view this is not a proper way to interpret and apply a statutory provision. There should be only one test; and that is whether the judgment relied on is relevant. We are of the view that once it is decided that under s. 43 a judgment in another proceeding is not relevant to the civil proceeding at hand, then it is not relevant for all purposes unless it can be brought within the "exception". On this issue, with respect, we disagree with the learned Judicial Commissioner.

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[28] The next issue which we would like to discuss is the submission by learned counsel for second defendant and third defendant that criminal judgment is relevant under s. 52 and 55 of the Evidence Act to show bad

- A character of the plaintiff that would have impact on claim of damages. This is where the argument by the learned counsel as regard to the last limb of s. 43 which says "... or is relevant under any other provision in this Act", is relevant. Learned Judicial Commissioner, after considering the pleadings, concluded that it is relevant under s. 55 of the Evidence Act 1950 because
- B the defendant is not seeking to rely on a single conviction to establish bad character but also seeking to rely on the pronouncement of the Federal Court as well as on the evidence of witnesses to be called at the trial.

- [29] The argument by the learned counsel for the second defendant and third defendant raised the issue of interplay between ss. 52, 53, 54 and 55 of the Evidence Act. However, ss. 53 and 54 only apply to criminal proceedings. Therefore, it is not relevant in a civil proceeding. Thus, the learned counsel reliance on explanation two in s. 54 is, in our view, misplaced.
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- D [30] In civil proceedings, ss. 52 and 55 are the relevant provisions. Under these two provisions, conviction for criminal offence is not relevant as evidence of bad character. Furthermore, the explanation to s. 55 makes it very clear that only evidence of general reputation and general disposition is admissible to prove bad or good character. It cannot be proved by a particular act. In this regard, we think that the Judicial Commissioner had
- E erred in concluding that the defendant is relying on general reputation and disposition. On the facts, we are of the view that the defendant by relying on the conviction of the plaintiff in the second sodomy case and the remark by the Federal Court as to the plaintiff's act of homosexual activities in the first sodomy case is in fact relying on particular acts to show general
- F reputation and general disposition of the plaintiff. We do not think that this is correct and permissible by virtue of the explanation to s. 55.

- [31] Based on the above reasonings, we are unanimous that the appeal by the defendants in Appeal No: 153 and 249 be dismissed with costs in the sum of RM5,000 to the respondent for each appeal; and that the appeal by the
- G plaintiff in Appeal No. 261 be allowed with costs of RM5,000 to the appellants. All deposits to be refunded to the respective appellants.

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